Cable-Masters, Inc. *and* Local 1109, Communications Workers of America, AFL–CIO. Case 1–CA–28114

June 11, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

Upon a charge filed by Local 1109, Communications Workers of America, AFL–CIO (the Union) March 19, 1991, and an amended charge filed May 6, 1991, the General Counsel of the National Labor Relations Board issued a complaint on May 15, 1991, against Cable-Masters, Inc., the Respondent, alleging that it has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. Although properly served copies of the charge, the amended charge, and the complaint, the Respondent has failed to file a proper answer.

On April 9, 1992, the General Counsel filed a Motion for Summary Judgment. On April 14, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, ''all of the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board.''

Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated June 24, 1991, notified the Respondent that unless an answer was received by close of business July 10, 1991, a Motion for Summary Judgment would be filed. By letter dated July 10, 1991, the Respondent requested an extension of time to file an answer to the complaint. By letter dated July 19, 1991, the Regional Director granted the Respondent's request to extend the time to file an answer to September 3, 1991. No answer having been received by September 3, 1991, counsel for the General Counsel informed the Respondent on September 26, 1991, by certified mail, that if no answer was received by close of business October 3, 1991, this motion would be filed. By a facsimile memorandum dated October 2, 1991, the Respondent filed an answer to the complaint. On November 15, 1991, counsel for the General Counsel telephonically advised the Respondent that an answer filed by facsimile was not acceptable. No further answer was filed.

The Respondent's answer is improper under Section 102.114(e) of the Board's Rules and Regulations, which specifically provides that facsimile transmissions of answers to complaints are not acceptable. Therefore, the Respondent has not filed an answer acceptable under the Board's Rules and Regulations within 14 days from the service of the complaint or within the extended time afforded it. Accordingly, in the absence of good cause being shown for the failure to file a proper answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation engaged in the installation of cable and wire, had an office and place of business in Canton, Massachusetts, where it annually purchased and received products, goods, and material valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts. The Respondent also annually provided services valued in excess of $50,000 for American Telephone and Telegraph, an enterprise directly engaged in interstate commerce, which has an office and place of business in Mansfield, Massachusetts. We find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Unit and the Union's Representative Status*

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full time and regular part time employees employed in the states of New York, New Jersey, Connecticut, Massachusetts, New Hampshire, Vermont and Maine excluding clerical employees and supervisors as defined by the Act.

At all times material, the Union has been the designated exclusive collective-bargaining representative of the employees in the unit and, until March 4, 1991, the Union had been recognized as the representative by the Respondent. Recognition was embodied in a collective-bargaining agreement effective November 1, 1988, to October 31, 1991.

At all times material, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

B. *Unlawful Threats and Promises*

The Respondent's owner, Kevin Ciccone, and the Respondent's operations manager, Chris Vianni, are supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13).

About February 11, 1991, the Respondent, acting through Ciccone, by telephone threatened its employees with layoff if they attempted to assert rights preserved by the collective-bargaining agreement, that it would no longer abide by the collective-bargaining agreement, and that it would shut down if the employees contacted the Union. About March 4, 1991, acting through Ciccone, the Respondent impliedly promised its employees increased wages if they would abandon their rights to bargain collectively through the Union and would become independent contractors.

About March 1, 1991, the Respondent, acting through Vianni, told employees at Boston, Massachusetts jobsites that they could work for the Respondent in the future only if they disavowed the Union and worked as independent contractors. About March 11, 1991, through Vianni, the Respondent by telephone told employees that their future employment with Respondent would be conditional on their disavowing the Union and working as independent contractors.

By the foregoing acts and conduct, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them by Section 7 of the Act, and the Respondent thereby has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

C. *Layoff and Constructive Discharge*

About March 1, 1991, and at times thereafter in March 1991, the Respondent laid off its employees Robert Morgan, Gerry O'Coin, Michael Banalewicz, Ronald Tavares, and Edward Kelley and conditioned their continued employment and/or reinstatement on their abandoning their right to bargain collectively through the Union and on their working as independent contractors. About March 1, 1991, by the acts and conduct described, the Respondent caused the termination of the named employees. The Respondent engaged in this conduct because the named employees and other employees joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in these activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

By the acts and conduct described above, the Respondent has discriminated, and is discriminating, in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and the Respondent has thereby been engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

C. *Refusals to Bargain*

About December 24 and 26, 1990, the Respondent required its employees to take vacation time in lieu of the unpaid layoff. About mid-February 1991, the Respondent laid off its employees and required them to use accrued vacation or sick time if they wished to be paid during the layoff. Since about March 4, 1991, the Respondent has failed to pay its employees wages and benefits in accordance with the 1988–1991 collective-bargaining agreement and has converted its employees to independent contractors. Although the foregoing are related to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining, the Respondent engaged in the acts and conduct described without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of the Respondent's employees with respect to the acts and conduct and the effects of the acts and conduct.

Since about November 1, 1990, the Respondent has failed and refused to remit the fringe benefit amounts that have become due under articles 18 and 19 of the 1988–1991 collective-bargaining agreement. Since about November 1, 1990, the Respondent has failed and refused to remit to the Union dues deducted from employees' wages as required by article 3 of the 1988–1991 collective-bargaining agreement. Since about March 1, 1991, the Respondent converted certain employees in the bargaining unit to independent contractors. Since about March 4, 1991, the Respondent has failed and refused to process grievances pursuant to the grievance-arbitration provision of the 1988–1991 collective-bargaining agreement.

Since about February 1, 1991, by the foregoing acts and conduct, the Respondent has failed and refused to abide by and adhere to the terms of the 1988–1991 collective-bargaining agreement, thereby repudiating that agreement.

Since about March 1, 1991, at diverse times in early March 1991, the Respondent, through Kevin Ciccone and Chris Vianni, at the Respondent's Canton facility, bypassed the Union and dealt directly with its employ-

ees by soliciting its employees to abandon their right to bargain collectively through the Union and to become independent contractors, and by impliedly promising them higher wages. On or about March 4, 1991, the Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the employees in the unit.

By the acts and conduct described above, the Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the representative of its employees, and the Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the Act.

CONCLUSIONS OF LAW

1. By making threats and promises in an attempt to coerce its employees to abandon their rights under the collective-bargaining agreement and to become independent contractors, the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and the Respondent has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. By laying off its employees Robert Morgan, Gerry O'Coin, Michael Banalewicz, Ronald Tavares, and Edward Kelley, and by conditioning their continued employment and/or reinstatement on their abandoning their right to bargain collectively through the Union and on their working as independent contractors, thereby causing the termination of the named employees, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. By unilaterally requiring its employees to take vacation or sick time during layoff; by failing to pay its employees wages and benefits in accordance with its collective-bargaining agreement and converting its employees to independent contractors; by failing and refusing to remit the fringe benefit amounts due; by failing and refusing to remit to the Union dues deducted from employees' wages; by failing and refusing to process grievances; by bypassing the Union and dealing directly with the employees by soliciting them to abandon the Union and become independent contractors, and by impliedly promising them higher wages; by withdrawing recognition from the Union; and by failing and refusing to abide by the terms of its collective-bargaining agreement thereby repudiating that agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the Act.

4. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to offer immediate and full reinstatement to employees Robert Morgan, Gerry O'Coin, Michael Banalewicz, Ronald Tavares, and Edward Kelley and to make them whole for any losses resulting from their unlawful layoff and termination as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to remove from its files any reference to the unlawful layoffs and terminations and to advise the discriminatees in writing that this has been done.

We shall order the Respondent to recognize and, on request, bargain in good faith with the Union as the collective-bargaining representative of the employees in the unit regarding wages, hours, and other terms and conditions of employment, and to process grievances pursuant to the grievance procedure of the 1988–1991 collective-bargaining agreement.

We shall order the Respondent to restore all terms and conditions of employment to the status quo as it existed before the unlawful unilateral changes were made and to make whole unit employees for any loss of wages or benefits resulting from the Respondent's failure to adhere to the terms of its collective-bargaining agreement, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, supra. The Respondent shall also reimburse its unit employees for any expenses ensuing from the Respondent's unlawful failure to make the required benefit payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, supra. We shall also order the Respondent to remit all fringe benefit amounts which have become due. Any additional amounts due the employee benefit funds shall be paid as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). The Respondent shall also forward to the Union the union dues it deducted from employees' wages, with interest as prescribed in *New Horizons for the Retarded*, supra.

Because there is some question as to whether or not Cable-Masters, Inc. still operates a facility in Canton,

Massachusetts, we shall also provide for mail notices to employees.

ORDER

The National Labor Relations Board orders that the Respondent, Cable-Masters, Inc., Canton, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with layoff if they attempt to assert rights preserved by their collective-bargaining agreement.

(b) Threatening employees that it will no longer abide by the collective-bargaining agreement and that it will shut down if employees contact the Union.

(c) Impliedly promising increased wages if the employees abandon their rights to bargain collectively through the Union and become independent contractors.

(d) Telling employees that their future employment with the Respondent will be conditional on their disavowing the Union and working as independent contractors.

(e) Laying off employees because of their protected concerted activities and terminating them by conditioning their continued employment and/or reinstatement on their abandoning their right to bargain collectively through the Union and on their working as independent contractors.

(f) Failing and refusing to recognize and bargain with Local 1109, Communications Workers of America, AFL–CIO as the exclusive collective-bargaining representative of the employees in the unit set forth below.

(g) Failing and refusing to bargain with the Union by making unilateral changes requiring employees to use vacation time or sick leave on layoff.

(h) Failing to pay employees wages and benefits in accordance with the collective-bargaining agreement and unilaterally converting employees to independent contractors.

(i) Failing and refusing to remit the fringe benefit amounts which have become due.

(j) Failing and refusing to remit to the Union dues deducted from employees' wages.

(k) Failing and refusing to process grievances.

(l) Failing and refusing to abide by and adhere to the terms of the collective-bargaining agreement, thereby repudiating that agreement.

(m) Bypassing the Union and dealing directly with employees and soliciting employees to abandon their right to bargain collectively through the Union by impliedly promising them higher wages.

(n) Withdrawing recognition of the Union as the exclusive collective-bargaining representative of the unit employees.

(o) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Robert Morgan, Gerry O'Coin, Michael Banalewicz, Ronald Tavares, and Edward Kelley immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful layoffs and terminations and notify the employees in writing that this has been done and that the layoffs and terminations will not be used against them in any way.

(c) Recognize and, on request, bargain with Local 1109, Communications Workers of America, AFL–CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full time and regular part time employees employed in the states of New York, New Jersey, Connecticut, Massachusetts, New Hampshire, Vermont and Maine excluding clerical employees and supervisors as defined by the Act.

(d) Give full force and effect to the terms and conditions of employment provided in the collective-bargaining agreement with the Union and make whole unit employees for any losses of wages or benefits resulting from the Respondent's repudiation of that agreement and its unlawful unilateral changes, in the manner set forth in the remedy section of this decision.

(e) Pay wages and benefits in accordance with the terms of the collective-bargaining agreement instead of unilaterally converting employees to independent contractors.

(f) Remit the fringe benefit amounts which have become due and reimburse unit employees for any expenses ensuing from the Respondent's unlawful failure to make the required payments, in the manner set forth in the remedy section of this decision.

(g) Remit to the Union the union dues deducted from employees' wages, in the manner set forth in the remedy section of this decision.

(h) Process grievances pursuant to the grievance procedure of the collective-bargaining agreement.

(i) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(j) Post at its facility in Canton, Massachusetts, and mail to the Union and to all unit employees a copy of the attached notice marked ''Appendix.''[1] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(k) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[1] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with layoff if they attempt to assert rights preserved by their collective-bargaining agreement.

WE WILL NOT threaten employees that we will no longer abide by the collective-bargaining agreement and that we will shut down if the employees contact the Union.

WE WILL NOT impliedly promise employees increased wages if they abandon their rights to bargain collectively through the Union and become independent contractors.

WE WILL NOT tell employees that their future employment with us is conditional on their disavowing the Union and working as independent contractors.

WE WILL NOT lay off employees because of their protected concerted activities and WE WILL NOT terminate employees by conditioning their continued employment and/or reinstatement on their abandoning their right to bargain collectively through the Union and on their working as independent contractors.

WE WILL NOT fail and refuse to bargain with Local 1109, Communications Workers of America, AFL–CIO as the exclusive collective-bargaining representative of our employees in the appropriate unit set forth below regarding their terms and conditions of employment.

WE WILL NOT fail and refuse to bargain with the Union by making unilateral changes requiring employees to use vacation time or sick leave on layoff.

WE WILL NOT fail to pay employees wages and benefits in accordance with our collective-bargaining agreement and unilaterally convert employees to independent contractors.

WE WILL NOT fail and refuse to remit the fringe benefit amounts which have become due.

WE WILL NOT fail and refuse to remit to the Union dues deducted from employees' wages.

WE WILL NOT fail and refuse to process grievances pursuant to our collective-bargaining agreement.

WE WILL NOT fail and refuse to abide by and adhere to the terms of our collective-bargaining agreement, thereby repudiating that agreement.

WE WILL NOT bypass the Union and deal directly with employees by soliciting employees to abandon their right to bargain collectively through the Union and become independent contractors by impliedly promising them higher wages.

WE WILL NOT withdraw recognition of and refuse to bargain with the Union as the exclusive collective-bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert Morgan, Gerry O'Coin, Michael Banalewicz, Ronald Tavares, and Edward Kelley immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the layoffs and terminations and WE WILL notify each of these employees in writing that this has been done and that the layoff and termination will not be used against him in any way.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All full time and regular part time employees employed in the states of New York, New Jersey, Connecticut, Massachusetts, New Hampshire, Vermont and Maine excluding clerical employees and supervisors as defined by the Act.

WE WILL continue in full force and effect the terms and conditions of employment provided in our collective-bargaining agreement with the Union and make whole unit employees for any losses of wages or bene-

fits resulting from our repudiation of that agreement and our unlawful unilateral changes.

WE WILL pay employees wages and benefits in accordance with our collective-bargaining agreement instead of unilaterally converting employees to independent contractors.

WE WILL remit the fringe benefit amounts which have become due, and WE WILL reimburse unit employees for any expenses ensuing from our unlawful failure to make the required payments.

WE WILL remit to the Union dues deducted from employees' wages.

WE WILL, on request, process grievances in accordance with grievance procedure of our collective-bargaining agreement.

CABLE-MASTERS, INC.